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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

GREAT AMERICAN AIRWAYS,
Petitioner,

vs.

NEVADA STATE TAX COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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QUESTIONS PRESENTED FOR REVIEW

The Nevada Sales and Use Tax Act imposes an "excise tax . . . on the storage, use or other consumption in this state of tangible personal property purchased from any retailer . . . for storage, use or other consumption in this state." A use tax was levied, without apportionment, on the purchase of an aircraft by a Nevada-based air carrier engaged exclusively in interstate transportation. The aircraft was delivered in Kansas and utilized for interstate travel before entering Nevada for any significant period of time. The aircraft subsequently logged extensive air and ground time outside of Nevada.

The questions presented for review are:

Is it error for a state court to employ the "home port doctrine" in a modern use tax case involving an instrumentality of interstate commerce?

Do the Commerce Clause and the Fourteenth Amendment Due Process Clause of the United States Constitution require a state to apportion any use tax levied on tangible personal property purchased and utilized exclusively in interstate commerce?

Is it impermissible for a state to require a taxpayer to prove actual duplicative taxation by other jurisdictions before that state will apportion its use tax on property purchased for and utilized in interstate commerce?

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OCTOBER TERM, 1985

GREAT AMERICAN AIRWAYS,
Petitioner,

VS.

NEVADA STATE TAX COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

The petitioner Great American Airways ("GAA") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Nevada, entered on August 27, 1985, rehearing denied on March 5, 1986.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada is reported at 101 Nev. 96, 705 P.2d 654 (1985), and is set out as Appendix A. Its order denying rehearing, presented as Appendix B, is not officially reported. The trial court's unreported decision is reprinted as Appendix C. The Findings of Fact, Conclusions of Law, and Decision of the State of Nevada Department of taxation are reproduced as Appendix D, and the notice that GAA's adminis-

trative appeal was denied by the Nevada State Tax Commission as Appendix E.

JURISDICTION

The Supreme Court of Nevada entered its opinion on August 27, 1985. A timely petition for rehearing was filed and was denied on March 5, 1986. This petition for certiorari is filed within ninety days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Commerce Clause of the United States Constitution provides:

> The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. art. I, § 8, cl. 3. The Due Process Clause of the Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty, or property without due process of law.

U.S. Const. amend. XIV, § 1.

The Nevada Sales and Use Tax Act, Chapter 397 of the 1955 Statutes of Nevada (codified for convenience, and herein cited, as Chapter 372 of the Nevada Revised Statutes (1985)), provides in relevant part—

> An excise tax is . . . imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer . . . for storage, use or other consumption in this state at the rate of [5.75 or 6] percent of the sales price of the property.

NRS 372.185.[1] Other state law provisions involved are NRS 372.075, 372.080, 372.100, 372.250, 372.255 and 372.265. Because of their length, their pertinent text is set forth in Appendix F.

STATEMENT OF THE CASE

This case presents questions of vital concern to interstate carriers who use or store equipment in more than one state, especially those carriers who purchase aircraft or other instrumentalities of interstate commerce outside their state of residency.

Nevada, like many other states, imposes a use tax on the storage, use or other consumption of tangible personal property in that state. NRS 372.185. GAA challenged Nevada's unapportioned use taxation of an aircraft purchased for use in interstate travel exclusively, delivered in Kansas, and subsequently used and stored in several states. The parties stipulated as to the details of these continuous, interstate events, which are recited at length in Appendix C, and which include the facts that all of GAA's flights are made to locations outside the State of Nevada where, in most cases, the aircraft remains overnight before returning to Nevada.

The State of Nevada Department of Taxation and the Nevada State Tax Commission ratified a deficiency assessment of an unapportioned use tax against GAA, concluding a "taxable incident" had occurred in Nevada. On appeal, the district court upheld the Commission's decision, and Nevada Supreme Court affirmed as well. 101 Nev. 96, 705 P.2d 654 (1985).[2] They

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[1] Nevada sales and use taxes are comprised of four separate taxes, each imposed by identically-worded statutes or ordinances. For convenience, and in accordance with Nevada practice, only the relevant sections of the original tax act are cited or reproduced here and in Appendix F. The total tax rate varies from 5.75 to 6 percent among Nevada counties.

[2] This judicial review proceeding required the Nevada Supreme Court to perform a function identical to that of the district court—to review the evidence presented to the administrative agencies in light of proper

reasoned that only Nevada had sufficient "nexus" with GAA to impose such a use tax, and refused to address other constitutional issues because GAA did not establish actual duplicative taxation.

REASONS FOR ALLOWANCE OF THE WRIT

I

THE NEVADA SUPREME COURT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT BECAUSE IT MISAPPLIES THE *COMPLETE AUTO* TEST AND IN FACT EMPLOYS THE HOME PORT DOCTRINE

The Nevada Supreme Court, and the state district court, recognized that the "taxable moment" theory adopted by the administrative agencies is no longer the appropriate Commerce Clause analysis of state taxation, and purported to apply the four prong test announced in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977), *reh'g denied,* 430 U.S. 976 (1977) ("*Complete Auto*"): A tax will be sustained against a "Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services proved by the state." *Id.* at 279.[3] Through imprecise reasoning, however, the state courts avoided all but the first element of this test, and in essence employed the now-defunct

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legal standards and to determine whether the tax department and commission acted contrary to law, arbitrarily, capriciously, or otherwise in abuse of their discretion. *See Southwest Gas Corp. v. Public Service Commission,* 96 Nev. 657, 614 P.2d 1080 (1980).

[3] The Due Process Clause imposes two limitations on state taxation, mirroring the "nexus" and "fair relation" factors of *Complete Auto:*

> First, no tax may be imposed unless there is some minimal connection between those activities and the taxing State; and in the second place, the [tax basis] must be rationally related to values connected with the State imposing the tax.

P. Hartman, *Federal Limitations on State and Local Taxation* § 2:4 at 28 (1981); *see Exxon Corp. v. Department of Revenue,* 447 U.S. 207 (1980).

"home port doctrine." In fact, an alarming number of state courts continue to decide Commerce Clause challenges to state taxes without even acknowledging the *Complete Auto* standards which this Court has developed and refined. *See, e.g., Beatrice Foods Co., Inc. v. Lindley,* 434 N.E.2d 727 (Ohio 1982) (upholding use tax under "taxable moment" approach); *District of Columbia v. W. Bell & Co., Inc.,* 420 A.2d 1208 (D.C. 1980) (to like effect).

This continued reliance on dated theories has been particularly apparent in use tax cases involving aircraft used for interstate transportation. *See King v. L & L Marine Service, Inc.,* 647 S.W.2d 524 (Mo. 1983); *Management Services, Inc. v. Spradling,* 547 S.W.2d 466 (Mo. 1977); *cf. Geometrics v. County of Santa Clara,* 129 Cal. App. 3d 415 (1982) (upholding *apportioned ad valorem* tax under *Complete Auto*). Other courts are committing errors akin to those of the state courts here. Despite this Court's general admonitions in cases concerning other forms of taxation, *see, e.g., Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 614-17 (1981) (state court erred in following "mechanical" approach of pre-*Complete Auto* cases, and concluding that severance tax was not subject to the strictures of the Commerce Clause), state courts continue to utilize discarded theories, not as the test of constitutionality per se, but rather as a means of characterizing the subject of taxation in such a way that it is "excused" from the *Complete Auto* analysis. *See, e.g., Master Craft Engineering, Inc. v. Department of Treasury.* 366 N.W.2d 235 (Mich. App. 1985).[4] State courts clearly need guidance on

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[4] The *Master Craft* court noted the four *Complete Auto* criteria, and that "[i]n recognition of this prohibition concerning interstate commerce, Michigan provides an exemption from the use tax for property which would otherwise be prohibited from taxation under the United States or Michigan Constitutions." 366 N.W.2d at 241 n. 3,242. Nevada has a similar statutory provision. NRS 372.265. To determine whether this exemption (and the *Complete Auto* test) would apply at all, the *Master Craft* court first asked whether the aircraft in question had "come to rest" in the state, whether a "taxable moment" had occurred. *Id.* at 242. Relying on cases dating from the 1930s, the court concluded that the taxable moment test was satisfied; although the aircraft was ultimately "thrust into the interstate stream of commerce," *id.* at 243,

this important federal question which, if answered wrongly, promises dire consequences for interstate commerce.

The Nevada district court and Supreme Court reasoned that, since GAA is based in Nevada, "only Nevada has a sufficient nexus with GAA to levy a use tax upon its out-of-state airplane purchase." Appendix A at 12. Therefore, concluded the courts, apportionment was not a relevant concern and Nevada could impose a use tax on the full sales price of its aircraft. This analysis is the essence of the home port doctrine, and the state courts were wrong to embrace this antiquated rationale and ignore the affirmative requirements of the Commerce Clause.

In *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979), this Court traced the history of the "home port doctrine" first enunciated in *Hays v. Pacific Mail S. S. Co.,* 17 How. 596, 15 L.Ed. 254 (1855), as

> a corollary of the medieval maxim mobilia sequintur personam ("movables follow the person," *see* Black's Law Dictionary 1154 (rev 4th ed 1968)) and resulted in personal property being taxable in full at the domicile of the owner. This theory of taxation, of course, has fallen into desuetude, and the "home port doctrine," as a rule for taxation of moving equipment, has yielded to a rule of fair apportionment among the States.

Japan Line, Ltd., 441 U.S. at 442. Clearly the Court has "abandoned" this "anachronistic" doctrine, *id.* at 443, one that in earlier times would permit the domiciliary State to impose an unapportioned on aircraft or other vessels so long as they had not "acquired a permanent location, *i.e.,* a taxing situs, elsewhere." *Northwest Airlines, Inc. v. Minnesota,* 322 U.S. 292, 295-96 (1944).

Other state courts have properly "conclude[d] that a 'home port doctrine' as a rule of state taxation of vessels engaged exclusively in interstate commerce has been superceded by the apportionment rule in *Complete Auto,*" specifically in use tax

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the *Master Craft* court apparently saw no need to consider the *Complete Auto* elements.

cases. *State v. Zach*, 502 A.2d 896, 905 (Conn. 1985). While giving lip service to *Complete Auto*, the Nevada courts still invoked the home port doctrine to sidestep the apportionment requirement of this seminal decision. This Court can clarify that *Complete Auto* has replaced older, wooden tests of state taxation in *all* forms, while assuring a constitutional result in this case, by granting certiorari.

II

THE NEVADA SUPREME COURT WRONGLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, IN APPARENT CONFLICT WITH THE DECISIONS OF THIS COURT, BY HOLDING THAT A USE TAX LEVIED ON PROPERTY USED BY A NEVADA RESIDENT IN INTERSTATE COMMERCE NEED NOT BE APPORTIONED

> In order to prevent multiple taxation of interstate commerce, this court has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value.

Japan Line, Ltd., 441 U.S. at 448. The Nevada Supreme Court ignored this apportionment requirement. Adopting the reasoning of the state district court, the Nevada Supreme Court concluded:

> [A] use tax is imposed upon an out-of-state purchase by a state resident when the object of the purchase is used, stored or consumed within the taxing state. NRS 372.185. The incidence of taxation of the use tax is the residency of the purchaser, the out-of-state purchase, and the use, storage or consumption of the purchased object within the state. *If these three incidents occur in one state,* that state may assess a use tax on the entire purchase price. *Id.* Under these circumstances, there is no danger of multiple state taxation of the same tax incidences. The use tax is a fairly apportioned tax.

Appendix A at 10-11 (emphasis in original). Assuming, as we must, that it correctly construes Nevada law,[5] this pronouncement runs afoul of the Commerce Clause and Due Process Clause, because it fails to recognize that a Nevada resident engaged in interstate commerce may indeed be subject to use taxes elsewhere. Other states *do not* consider residency an incident of use taxation, and *do not* exempt non-residents from use taxes which represent a fair return for protections and benefits provided. *See, e.g., State v. Zach,* 502 A.2d at 899 n.4, 902-03 (Connecticut imposes use tax on federally-registered vessels of Delaware corporations having no connection with Connecticut other than in interstate commerce). Because of the Nevada Supreme Court's failure to require apportionment, interstate commerce will suffer, and GAA will be required to pay a levy not fairly related to benefits provided it by the State of Nevada.

Apportionment has not been at issue in most of the recent state taxation cases entertained by this Court. Because of the nature of each taxing scheme under review, or some balancing feature built into it, *Complete Auto* and its progeny have not outlined in detail the minimum prerequisites of a validly apportioned tax. *See, e.g., Commonwealth Edison Co. v. Montana,* 453 U.S. at 617. This lapse in state tax jurisprudence does not mean that apportionment is left to the whim of the states, however; apportionment remains an affirmative requirement of the Commerce Clause and of Due Process.

Most state court opinions that address apportionment in depth deal with *ad valorem* property taxation, but support the general principle that apportionment of taxes is not at the option of a state.[6] In *Geometrics v. County of Santa Clara,* 179 Cal. Rptr.

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[5] The referenced statute makes *no* reference to residency as an incident of taxation. GAA knows of no other Nevada law or decision which supports this reading. In contrast, residency is an express factor in applying the statutory presumptions that property purchased out-of-state by a Nevada resident is intended for use in Nevada, absent contrary evidence. NRS 372.250-372.255.

[6] Notably, Nevada *does* apportion the *ad valorem* property tax it assesses against GAA's aircraft. The Nevada Administrative Code

850 (Cal. App. 1982), the parties stipulated that there was no "multiple taxation in fact." *Id.* at 8-2. Still, after thorough and scholarly consideration of key state and United States Supreme Court precedents, the court concluded that *Complete Auto* required apportionment of any property tax imposed on aircraft owned by a domiciliary corporation but located physically in foreign countries for all or a portion of the tax year. *See also Montana-Dakota Utility Co. v. South Dakota Department of Revenue,* 337 N.W. 2d 818 (S.D. 1983) (requiring apportionment of *ad valorem* tax, although validity of neighboring state's competing tax was in question); *Flying Tiger Line, Inc. v. County of Los Angeles,* 333 P.2d 323 (Cal. 1959), *following Slick Airways v. County of Los Angeles,* 295 P.2d 46 (Cal. App. 1956). But while some state courts have properly acknowledged the mandatory nature of Commerce Clause requirements, others have not.

The Nevada Supreme Court's refusal to enforce the apportionment requirement brings its decision into conflict with other aspects of *Complete Auto.* Nevada residents who do not employ property out-of-state in the course of interstate commerce do not face the threat of multiple use taxes, or the burden of maintaining multiple protests to assessments that will not be apportioned unless actual duplicative taxation is established. *See infra.* A use tax that unfairly apportions the use of property in other States is a form of discrimination against interstate commerce. *Cf. Armco, Inc. v. Hardesty,* 467 U.S. 638, 645 (1984). Further, a system that lacks any method of measuring the taxable activity that occurs within the taxing State cannot produce a tax fairly related to services and protections enjoyed by the taxpayer in that state. *Cf. Commonwealth Edison Co. v. Montana,* 453 U.S. at 625-26 ("the measure of the tax must be reasonably related to the extent of the contact"); *see also Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159 (1983) *and Sjong v. Department of Revenue,* 622 P.2d 967 (Alaska 1981), *app. dismissed,* 454 U.S. 1131 (1982) (explaining requisites of valid apportion-

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("NAC") contains extensive regulations for this purpose. NAC 361.451-361.4695.

ment formulae). Thus, Nevada's unapportioned use tax falls short of not only one, but three criteria of *Complete Auto.*

These unconstitutional aspects of Nevada's use tax cannot be overlooked simply because the tax is intended to be "compensatory," offsetting Nevada's sales tax. *Cf.* Appendix A at 10-11; *see generally Armco, Inc. v. Hardesty, supra.* "The concept of a compensatory tax first requires identification of the burden for which the State is attempting to compensate." *Maryland v. Louisiana,* 451 U.S. 725, 758 (1981). To be sure, Nevada has an interest in preventing evasion of its sales tax, "to assure uniform treatment of goods and materials *to be consumed in the State.*" *Id.* at 759 (emphasis added). But no such equality exists where the property is consumed in several States. Each State in which GAA's aircraft sets down has a similar incentive to compensate for its sales tax. If each levies an unapportioned use tax, interstate commerce will be impermissibly burdened. And, each State would also be demanding more than a fair return for benefits conferred on GAA.

Clearly, Nevada is constitutionally barred from levying its sales tax on GAA's out-of-state purchase. *McLeod v. Dilworth Co.,* 322 U.S. 327 (1944); *State v. Obexer & Son, Inc.,* 99 Nev. 233, 660 P.2d 981 (1983). The State cannot effect the same result under the guise of a compensating use tax, and any true *use* tax liability must comply with the strictures of the Commerce Clause.

III

THE NEVADA SUPREME COURT IGNORED RECENT DECISIONS OF THIS COURT WHEN IT REFUSED TO CONSIDER APPORTIONMENT UNLESS GAA DEMONSTRATED ACTUAL MULTIPLE TAXATION

The Nevada Supreme Court concluded that it "need not address GAA's concern that Nevada's taxing scheme may result in multiple taxation because GAA's failure to demonstrate *actual multiple taxation* is fatal to its assignment of error." Appendix A at 9 (emphasis added). The state court was wrong to place this burden of proof on GAA, thereby avoiding consideration of the

constitutional minima of a state tax. While earlier decisions of this Court were not entirely uniform on this point, the Court recently made clear that the taxpayer need only show a risk of multiple taxation. The Nevada court ignored this directive.

The state court in *Armco, Inc. v. Hardesty, supra,* also called on the taxpayer to show a duplicative tax imposed by some other state. This Court explained in reversing the state court, "This is not the test." 467 U.S. at 644. Rather, the tax must be judged as "if applied by every jurisdiction." *Id., quoting Container Corp. of America v. Franchise Tax Board,* 463 U.S. at 169. *See also Central Railroad Co. of Pennsylvania v. Pennsylvania,* 370 U.S. 607, 614 (1962) ("domiciliary State is precluded from imposing an *ad valorem* tax on any property to the extent that it *could* be taxed by another state, not merely on such property as *is* subject to tax elsewhere") (emphasis in original); *Freeman v. Hewitt,* 329 U.S. 249, 256 (1946) ("that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated").[7]

Despite these directives, the state courts are mired in confusion. The Nevada courts ignored these authorities and imposed a heightened burden on GAA before they would confront the constitutional matter of apportionment. A Wisconsin court recently voiced its view that a conflict among Supreme Court opinions persists, although citing only the isolated case of *General Motors Corp. v. Washington,* 377 U.S. 436 (1964), as suggesting that actual multiple taxation must be demonstrated. *Wisconsin Telephone Co. v. Wisconsin Department of Revenue,* 371 N.W. 2d 825, 830 (Wis. App. 1985). Perhaps the Nevada and Wisconsin courts did not consider this Court's recent examples to be controlling in the *use* tax cases before them. In any event, the

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[7] Other cases commonly cited as establishing that the taxpayer's burden is to demonstrate a *risk* of multiple taxation include: *Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 425, 443 (1980), *Standard Pressed Steel Co. v. Department of Revenue,* 419 U.S. 560, 563 (1975), and *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 462-63 (1959). *See Whitcomb v. Commissioner of Taxes,* 479 A.2d 164, 168 (Vt. 1984).

Nevada Supreme Court's imposition of an "actual multiple taxation" burden deprived GAA of a fair opportunity to correct an unconstitutional, unapportioned tax. Review by this Court should prevent the likely reoccurrence of similiar errors in other state tax cases.

CONCLUSION

This Court should issue a writ of certiorari to the Supreme Court of Nevada in this case. It is crucial to the smooth working of interstate commerce that all States abide by modern Commerce Clause doctrine in administering all state taxes. The factual scenario presented here—the imposition of a use tax on aircraft employed in interstate transportation—is one which arises time and again. Review in this case will redress the Nevada Supreme Court's conflict with this Court's decisions, and complement the existing caselaw which construes and refines the *Complete Auto* test.

Respectfully submitted,

LIONEL SAWYER & COLLINS

BY: RICHARD G. CAMPBELL
Attorneys for Petitioner

(Appendices follow)

APPENDIX A

OPINION

No. 15992. In the Supreme Court of the State of Nevada.

Great American Airways, a Nevada corporation, Appellant, vs. Nevada State Tax Commission, an administrative agency of the State of Nevada, Respondent.

Filed: August 27, 1985.

Appeal from decision affirming the judgment of the Nevada Tax Commission, and ordering Great American Airways to pay a use tax assessed against it for using, consuming and storing in Nevada an aircraft purchased in Kansas.

Affirmed.

Lionel Sawyer & Collins,
Laura B. Ahearn and
Richard G. Campbell, Reno,
for Appellant.

Brian McKay, Att'y Gen.
and Michael Dougherty, Deputy
Att'y Gen., Carson City,
for Respondent.

OPINION

PER CURIAM:

Great American Airways (GAA) is a Nevada corporation, headquartered in Reno, engaged in the interstate transportation of charter air passengers. GAA primarily transports charter groups for the Carson City Nugget. Frequently, flights are made to destinations outside of Nevada where, in most instances, the aircraft remains overnight before returning to Nevada.

On or about July 2, 1979 GAA purchased, in Kansas, a DC-9 aircraft from Trans World Airways (TWA) for $3,600,000.00. During oral argument before this court,

GAA's counsel admitted that GAA was not required to pay a sales tax in Kansas.

The Department of Taxation conducted an audit of the books and records of GAA covering the period July 1, 1979 through November 30, 1979. As a result of the audit, GAA was assessed taxes and penalties totaling $128,520.00 ($72,000.00 attributable to GAA's use, consumption and storage, in Nevada, of the DC-9 aircraft purchased in Kansas).

The gravamen of GAA's complaint is: 1) that the levying of a use tax on its out-of-state aircraft purchase unconstitutionally burdens interstate commerce, and 2) that its aircraft purchase was exempted from use taxation as an "occasional sale" under NRS 372.320.[1]

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[1] NRS 372.320 reads: "There are exempted from the taxes imposed by this chapter the gross receipts from occasional sales of tangible personal property and the stor-

We reject both propositions. Firstly, the tax did not unconstitutionally burden interstate commerce because it was fairly apportioned, nondiscriminatory and fairly related to services provided by Nevada. See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), reh'g denied, 430 U.S. 976 (1977). Secondly, GAA presented no evidence from which the Department of Taxation or the trial court could have determined that its aircraft purchase was exempt as an "occasional sale" and thus did not sustain its burden of proof. See NRS 372.320.

Originally, interstate commerce was immune from state taxation, but now interstate commerce is required to pay its just

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age, use or other consumption in this state of tangible personal property, the transfer of which to the purchaser is an occasional sale."

share of state tax burdens. See Braniff Airways, Inc. v. Nebraska State Board of Eq. & A., 347 U.S. 590, 598 (1954), reh'g denied, 348 U.S. 852 (1954). Where a tax goes too far, it will be struck down as burdening interstate commerce. In determining if a tax is excessively burdensome, analysis focuses on the tax's practical effects. "In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.'" Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615 (1981), reh'g denied, 453 U.S. 927 (1981) quoting from Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 443 (1980).

The four prong test announced in Complete Auto Transit, Inc. v. Brady, 430

U.S. 274 (1977), reh'g denied, 430 U.S. 976 (1977) culminated the United States Supreme Court's efforts to focus on a tax's practical effects. A tax will be sustained against a "Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state." Id. at 279.

Complete Auto is the bench mark of state taxation of interstate commerce. See George S. Carrington Co. v. State Tax Com'n, 377 N.E.2d 950, 952 n. 3 (Mass. 1978). Complete Auto's four prong test has been applied to a use tax on an airplane, Whitcomb v. Commissioner of Taxes, 479 A.2d 164 (Vt. 1984), a first-use tax on natural gas, Maryland v. Louisiana, 451

U.S. 725 (1981), a sales tax, George S. Carrington Co. v. State Tax Com'n, 377 N.E.2d 950 (Mass. 1978), a privilege tax, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), reh'g denied, 430 U.S. 976 (1977), and a severance tax, Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), reh'g denied, 453 U.S. 927 (1981).

At issue in this case is the propriety of a use tax, NRS 372.185,[2] imposed upon GAA's out-of-state purchase of an airplane used in interstate commerce and hangared in Reno. GAA contends the use tax imposed on its purchase violated the Complete Auto

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[2] NRS 372.185 reads:

> An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1955, for storage, use or other consumption in this state at the rate of 2 percent of the sales price of the property.

test because it was unapportioned, discriminatory, and not fairly related to values attributable to Nevada.[3] GAA's nexus to Nevada is conceded.

A properly apportioned tax does not tax activities carried on outside the state's borders and does not result in multiple taxation. Complete Auto, 430 U.S. at 282. See also General Motors Corp. v. Washington, 377 U.S. 436, 440-441 (1964), reh'g denied, 379 U.S. 875 (1964). Improper apportionment results in multiple taxation

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[3] GAA also challenged the tax on due process grounds. Due process challenges have focused on the taxing jurisdiction's nexus to the taxpayer and whether the taxing jurisdiction provided services to the taxpayer for which it could seek reimbursement, the first and fourth prongs of the Complete Auto test. See Commonwealth Edison Co. v. Montana, 453 U.S. at 622-629; Chicago Bridge & Iron v. State, Dept. of Rev., 659 P.2d 463, 467 (Wash. 1983), appeal dismissed, ____ U.S. _____, 104 S.Ct. 542 (1983). Because of this duplication, GAA's due process concerns will not be treated separately.

and multiple taxation is clearly unconstitutional. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 452 (1959).

GAA's argument concerning apportionment focuses on two points: 1) that because NRS 372.345[4] does not expressly provide an exemption for sales and use taxes paid in other states, there is the possibility of multiple taxation and 2) that because appellant's airplane is partially used and consumed outside of Nevada, Nevada can only tax a portion of the plane's value.

We need not address GAA's concern that Nevada's taxing scheme may result in multiple taxation because GAA's failure to

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[4] NRS 372.345 reads: "The storage, use or other consumption in this state of property, the gross receipts from the sale of which are required to be included in the measure of the sales tax, is exempted from the use tax."

demonstrate actual multiple taxation is fatal to its assignment of error. Whitcomb v. Commissioner of Taxes, 479 A.2d 164, 168 (Vt. 1984). GAA's counsel admitted that no sales tax was paid in Kansas, and there has been no showing that other states are attempting to extract a functionally equivalent use tax from GAA. Because of this failure of proof, we need not decide what effect a foreign jurisdiction's uncredited sales or use taxes would have on Nevada's taxing scheme.

GAA's argument that Nevada should apportion its use tax based upon the amount of miles flow in Nevada or hours spent in Nevada would not only be administratively complicated for both the state and the taxpayer, but also misconceives the function of a use tax,[5] namely, to

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[5] Use taxes are a form of excise tax. They have long withstood constitutional chal-

prevent evasion of the state sales tax.

As the district court judge ably noted,

> [A] use tax is imposed upon an out-of state purchase by a state resident when the object of the purchase is used, stored or consumed within the taxing state. NRS 372.185. The incidence of taxation of the use tax is the residency of the purchaser, the out-of-state purchase, and the use, storage or consumption of the purchased object within the state. If these three incidents occur in one state, that state may assess a use tax on the entire purchase price. Id. Under these circumstances, there is no danger of multiple state taxation of the same tax incidences. The use tax is a fairly apportioned tax. (Emphasis added.)

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lenge and are employed "by all states that have sales taxes in order to prevent evasion of the sales tax, to equalize the burdens on interstate and intrastate transactions, and to expand the reach of the sales tax beyond state boundaries. The use tax is complementary to the sales tax." White, State Sales and Use Taxes - Variations, Exemptions, and the Aviation Industry, 45 Journal of Air Law and Commerce, 509, 515-516 (1980). (Footnote omitted.)

In Commonwealth Edison, while rejecting the notion of a "local event," the Supreme Court dismissed an apportionment challenge by noting: "Nor is there any question here regarding apportionment or potential multiple taxation, for as the state court observed, 'the severance can occur in no other state' and 'no other state can tax the severance.'" Commonwealth Edison, 453 U.S. at 617. Viewing the use tax as complimentary to the sales tax, only Nevada has a sufficient nexus with GAA to levy a use tax upon its out-of-state airplane purchase. The special relationship between sales and use taxes, along with the Complete Auto criteria, makes the tax in the case at bar inherently apportioned.

GAA also contends that Nevada's use tax unduly burdens interstate commerce because

it is discriminatory. The discrimination prong of the Complete Auto test requires that the state place no greater burden upon interstate commerce than it places upon competing intrastate commerce of like character. Complete Auto, 430 U.S. at 282.

> [A] State "may not discriminate between transactions on the basis of some interstate element." Boston Stock Exchange, supra, 429 U.S., at 332, n. 12, 97 S.Ct., at 608, n. 12. That is, a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.

Armco, Inc. v. Hardesty, ____ U.S. ____, ____, 104 S.Ct. 2620, 2622 (1984), reh'g denied, ____ U.S. ____, 105 S.Ct. 285 (1984).

Nevada's use tax, like the gross proceeds sales tax in Chicago Bridge & Iron v. State, Dept. of Rev., 659 P.2d 463, 472 (Wash. 1983), appeal dismissed, ____ U.S.

____, 104 S.Ct. 542 (1983) "treats intrastate and interstate businesses equally, making no distinction between them." Any air carrier headquartered in Nevada, whether intrastate or interstate, making an out-of-state purchase of an airplane which will be used, consumed or stored in Nevada, is potentially subject to use taxation. Under such circumstances, there is no discrimination because intrastate and interstate commerce are equally burdened.

In passing, GAA argues that Nevada's use tax is not fairly related to values attributable to Nevada. This prong of the Complete Auto test was addressed in Commonwealth Edison. The inquiry is premised on whether the state has given anything for which it can ask return and is closely allied with the nexus inquiry. The greater

the nexus, the less likely a benefits challenge will be sustained. Because GAA has a substantial nexus with Nevada and derives many benefits from being a Nevada corporation headquartered in Reno, the tax is fairly related to values attributable to Nevada.[6]

NRS 372.320 exempts an "occasional sale" from sales and use taxation. The specific facts of each case are critical

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[6] We also conclude, under the former test for state taxation of interstate commerce, that there was a taxable moment, Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939), in Nevada, when GAA's aircraft had ended its interstate transportation and not yet begun interstate operation. The taxable moment was the storage which occurred when the aircraft returned from Kansas City and was stored in Reno prior to beginning interstate operation on September 26, 1979. Compare W. R. Grace & Co. v. Comptroller of Treasury, etc., 258 A.2d 740 (Md. 1969) with Management Servs., Inc. v. Spralding, 547 S.W.2d 466 (Mo. 1977) and American Airlines, Inc. v. State Bd. of Equalization, 30 Cal. Rprtr. 590 (Cal. App. 1983).

to evaluating whether a transaction is exempted as an "occasional sale." Additionally, the taxpayer bears the burden of proving that he is entitled to the exemption. See Pacific Pipeline Const. Co. v. State Board of Equal., 321 P.2d 729, 732 (Cal. 1958). Because GAA failed to prove that its purchase from TWA was an "occasional sale," the exemption does not apply.

GAA's remaining contentions lacking merit, we affirm the decision of the district court.

APPENDIX B

ORDER DENYING REHEARING

No. 15992. In the Supreme Court of the State of Nevada.

Great American Airways, a Nevada corporation, Appellant, vs. Nevada State Tax Commission, an administrative agency of the State of Nevada, Respondent.

Filed: March 5, 1986.

ORDER DENYING REHEARING

Appellant's petition for rehearing has been considered and it is denied. NRAP 40(c).

It is so ORDERED.

APPENDIX C

DECISION

No. 80-9620. In the Second Judicial District Court of the State of Nevada, In and For the County of Washoe. Department No. 1.

Great American Airways, a Nevada Corporation, Petitioner, vs. Nevada State Tax Commission, an administrative agency of the State of Nevada, et al., Respondents.

Filed: June 22, 1984.

The parties to this petition for judicial review have stipulated to the following facts. Petitioner, Great American Airways, is a Nevada corporation engaged in providing contract air service in interstate commerce. On July 2, 1979, Petitioner purchased a DC-9 aircraft from Trans World Airways (TWA) at a purchase price of $3,600,000. Petitioner took

delivery of the aircraft in Wichita, Kansas. The aircraft was then flown to Kansas City, Kansas, for repairs according to the maintenance contract. The aircraft was registered in Kansas City, Missouri.

In September, 1979, the aircraft and its crew underwent flight testing in order to obtain federal certification with the Federal Aviation Administration. The crew, the federal inspectors, and some non-paying passengers boarded the aircraft in Kansas City and flew to Reno, Nevada. The passengers deplaned in Reno. The aircraft was refueled and resumed its flight to Seattle, Washington. After practicing landing maneuvers in Seattle, the aircraft was returned to Reno where it remained overnight. The next day the aircraft, its crew and the federal inspectors flew to Boise, Idaho, and

returned to Reno prior to September 26, 1979.

On September 26, 1979, Petitioner was issued its operating certificate and it commenced commercial air operations. Petitioner assisted Evergreen International Airlines with Evergreen's charter commitments, including Evergreen's air charter service agreement with the Carson City Nugget (Nugget) from September 26, 1979, to September 30, 1979. Thereafter, Petitioner contracted with the Nugget to provide charter air service.

All Petitioner's flights are made to locations outside the State of Nevada. In most cases, the aircraft remains overnight at an out-of-state location before returning to Reno. All major maintenance of the aircraft is done in Kansas City, Kansas, under a contract with TWA. Minor mainte-

nance is accomplished in either Oakland, California, or Los Angeles, California. All revenue that is received by Petitioner arises from contracts with Nevada entities.

On February 1, 1980, Respondent notified Petitioner that a deficiency assessment in the amount of $126,000, together with interest in the amount of $2,000, had been made pursuant to NRS 372.425. The deficiency was determined for the period beginning July 1, 1979, and ending November 30, 1979. $72,000 was assessed for the Sales & Use Tax, $36,000 for the Local School Support Tax, and $18,000 for the County-City Relief Tax.

On February 14, 1980, a Petition for Redetermination was filed by Petitioner. That Petition alleged that Petitioner was entitled to a constitutional exemption

from taxation under NRS 372.265. On May 12, 1980, the Petition for Redetermination was set for hearing before a Nevada Tax Commission Hearing Officer. On May 22, 1980, the Hearing Officer entered Findings of Fact and Conclusions of Law which rejected Petitioner's claim of a constitutional exemption. Petitioner appealed that decision to the Nevada State Tax Commission. On October 7, 1980, the Tax Commission denied Petitioner's appeal and affirmed the Hearing Officer's decision.

This case comes before this court upon a Petition for Judicial Review in accordance with NRS Chapter 233B. NRS 233B.140(4) provides, in pertinent part, that "[t]he court, upon request, shall hear oral argument and receive written briefs." The parties have submitted their briefs in the form of Cross-Motions for

Summary Judgment pursuant to NRCP 54 and have referred the court to Short v. Hotel Riviera, Inc., 79 Nev. 94, 378 P.2d 979 (1963), as the applicable standard for review. Since this is a matter for judicial review, the court is bound to follow the standards articulated in the Administrative Procedure Act, as provided in NRS 233B.140(5) and the cases of the Nevada Supreme Court which interpret that statutory section. See, e.g., Garvin v. State, Dep't. of Mtr. Vehicles, 96 Nev. 827, 619 P.2d 534 (1980); Turk v. Nevada State Prison, 94 Nev. 101, 575 P.2d 599 (1978); Nevada Industrial Comm'n. v. Williams, 91 Nev. 686, 541 P.2d 905 (1975). NRS Chapter 233B does not provide for the application of the Nevada Rules of Civil Procedure. This court will, therefore, ignore the procedural dereliction of the

parties and will consider this matter as if the parties had followed proper procedure.

Petitioner has alleged that Respondent's decision is not in accordance with the United States Constitution or statutory provisions and has applied for judicial review in accordance with NRS 233B.140(5)(a). The Petitioner has raised two issues in its Petition for Judicial Review. They are:

1. That Respondent accepted new evidence while acting in an appellate capacity, refused to allow Petitioner to respond to this new evidence, and in doing so, denied Petitioner its constitutional right to due process; and

2. That the tax imposed upon Petitioner is an impermissible burden upon interstate commerce in violation of the

Commerce Clause of the United States Constitution.

This court believes that the first issue raised by Petitioner is without merit. The record provided this court fails to show any evidence that Respondent considered additional evidence. Furthermore, at oral argument, counsel for the parties informed this court that there were no real statutory problems in this case. Counsel conceded that the real issue in this case is the constitutionality of the assessed tax. In view of that concession, this court will only consider the constitutional argument raised by the Petitioner.

Petitioner contends that its aircraft has been engaged in interstate commerce since the date of purchase on July 2, 1979. Petitioner argues that since the

aircraft has been in the stream of interstate commerce, a "taxable moment" did not occur in the State of Nevada. Therefore, the use tax is per se unconstitutional as an impermissible burden on interstate commerce. See Southern Pac. Co. v. Gallagher, 306 U.S. 167, 59 S.Ct. 389 (1939); King v. L & L Marine Service, Inc., 647 S.W.2d 524 (Mo. 1983). Additionally, Petitioner asserts that although Gallagher has not been overruled by the United States Supreme Court, that the High Court has adopted a new test which applies to all state taxation of interstate commerce. Petitioner asserts that this court must apply this new test, as pronounced in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076 (1977), reh'g denied, 430 U.S. 976, 97 S.Ct. 1669, to this case. It is Petitioner's contention

that the use tax will fail the apportionment prong of the Complete Auto four-prong test.

Respondent argues that the test of Complete Auto has not been applied to a state use tax and, therefore, it should not be applied in this case. Respondent also contends that a "taxable moment" occurred in this state and urges this court to apply the analysis of Gallagher to this case.

After reading the administrative record, the briefs which were submitted by the parties, several constitutional treatises, and several law review articles, this court is persuaded that the proper analysis to be applied in this case is the four-prong test of Complete Auto. Although Gallagher has not been specifically overruled by the United States Su-

preme Court, the "taxable moment" theory of the case does not appear to be the appropriate modern analysis of state taxation and the Commerce Clause of the federal constitution. See e.g., Commonwealth Edison Co. v. Montana, 453 U.S. 609, 101 S.Ct. 2946 (1981), reh'g denied, 453 U.S. 927, 102 S.Ct. 889 (Complete Auto applied to state severance tax); Nat. Geographic Soc. v. Cal. Bd. of Equal., 430 U.S. 551, 97 S.Ct. 1386 (1977) (Complete Auto applied to state use tax); L. Tribe, American Constitutional Law §6-14 to 19, at 344 to 369 (1978); Note, A Deferential Interpretation of the Complete Auto Transit Test for Determining Whether a State Tax Unconstitutionally Burdens Interstate Commerce: Commonwealth Edison Co. v. Montana, 1982 B.Y.U. L. Rev. 765; Hellerstein, State Taxation in the Federal

System: Perspectives on Louisiana's First Use Tax on Natural Gas, 55 Tul. L. Rev. 601 (1981); White, State Sales and Use Taxes - Variations, Exemptions, and the Aviation Industry, 45 J. Air. L. and Comm. 509 (1980). Since the United States Supreme Court has declared that interstate commerce must pay its way, states may now tax property which is in interstate commerce if the tax scheme falls within the ambits of the Complete Auto test. A state court, however, in analyzing a state tax scheme is also free to determine that the tax is too burdensome upon interstate commerce. See, e.g., King v. L & L Marine Service, Inc., supra.

I believe that the use tax as applied to Petitioner's aircraft is a valid state tax and falls within the test of Complete Auto. In Complete Auto, the United States

Supreme Court held that a tax on the privilege of doing business in a state does not violate the commerce clause, absent a claim (1) that the business's activity does not have sufficient nexus with the state, (2) that the tax discriminates against interstate commerce, (3) that the tax is unfairly apportioned, or (4) that the tax is unrelated to the services provided by the state. See L. Tribe, supra. At the outset, I note that Petitioner has only challenged the apportionment prong of Complete Auto. Therefore, I will analyze the case at bar in view of this prong only. Since this is the only challenge to the validity of the tax, this court assumes that Petitioner is satisfied that the use tax passes federal constitutional muster as to the three other prongs. I, therefore, turn to this

analysis.

Apportionment as used in the Complete Auto test is a means to prevent multiple taxation of the same tax incidence. See White, State Sales and Use Taxes - Variations, Exemptions, and the Aviation Industry, supra; Note, The Supreme Court, 1976 Term, 91 Harv. L. Rev. 72 (1977). Multiple taxation does indeed hinder interstate commerce and has been often criticized by the United States Supreme Court. See, e.g., Northwest Airlines v. State of Minnesota, 322 U.S. 292, 64 S.Ct. 950 reh'g denied, 323 U.S. 809, 65 S.Ct. 26. A state tax is said to be fairly apportioned if it adequately reflects the incidence of the tax in the taxing state. Id.; Note, The Supreme Court, 1976 Term, supra. For example, a state sales tax applies to the purchase of an object within a state.

That purchase happens in only one state. It is therefore, a fairly apportioned tax. Likewise, a severance tax applies to the removal of minerals from one state. Again, the removal of the minerals is an event which happens in one state only. A state mineral severance tax is also a fairly apportioned tax. Thus, the pertinent question in this case is whether the incidence of the use tax occurs only in this state.

The use tax as provided in NRS Chapter 372 is intended to complement the sales tax. Compare NRS 372.105 with NRS 372.185. See also, Nat. Geographic Soc. v. Cal. Bd. of Equal., supra; Union Oil Co. of Cal. v. State Board of Equalization, 386 P.2d 496 (Ca. 1963), appeal dismissed, 377 U.S. 404, 84 S.Ct. 1629 (1964). As noted above, a state

sales tax is assessed upon a purchase which is made within the state. As a complementary tax, a use tax is imposed upon an out-of-state purchase by a state resident when the object of the purchase is used, stored or consumed within the taxing state. NRS 372.185. The incidence of taxation of the use tax is the residency of the purchaser, the out-of-state purchase, and the use, storage or consumption of the purchased object within the state. If these three incidents occur in one state, that state may assess a use tax on the entire purchase price. Id. Under these circumstances, there is no danger of multiple state taxation of the same tax incidences. The use tax is a fairly apportioned tax.

In the case at bar, Petitioner is a Nevada resident. Petitioner purchased the

aircraft out-of-state. Petitioner uses, stores and consumes the aircraft within Nevada. Under these circumstances, Nevada is the only state which can assess a use tax. Cf. Commonwealth Edison Co. v. Montana, supra (Montana only state which could assess a mineral severance tax); Northwest Airlines v. State of Minnesota, supra, (Minnesota only state which could assess a recurring ad valorem tax). Furthermore, the Petitioner has failed to bring forth any evidence which would indicate that it is subject to multiple taxation. See Standard Pressed Steel Co. v. Washington Dept. of Rev., 419 U.S. 560, 95 S.Ct. 706 (1975).

Therefore, based upon the record presented to this court, I find that the assessed use tax is properly apportioned and that the use tax passes federal con-

stitutional muster. I affirm the decision below and further order Petitioner to pay the assessed tax due Respondent.

DATED this 22nd day of June, 1984.

/s/ GRANT L. BOWEN
DISTRICT JUDGE

APPENDIX D

DECISION

Docket No. 11524. Account No. 204-751. State of Nevada Department of Taxation.

In Re Great American Airways, Inc., on Petition for Redetermination of a Deficiency Determination.

This matter came on for hearing before the Hearing Officer in the offices of the Department situated in Carson City, Nevada, on the 12th day of May, 1980.

Appearing for the taxpayer were Richard G. Campbell, Esq., attorney; Mr. Ronald M. Fune, President and Mr. Ken Damask, Director of Finance. Representing the Department were Mr. Gerald Rodrigue, Chief of Audit; Mr. Robert Retrum, Supervising Auditor and Ms. Josephine Matthews, Senior Auditor.

An audit of the books and records of

Great American Airways covering the period July 1, 1979 through November 30, 1979 had been conducted. As a result of the audit, a Deficiency Determination in the total amount of $128,520.00 was issued on February 1, 1980. The amount included tax of $126,000 together with interest in the amount of $2,520.00. A Petition for Redetermination was timely filed on February 14, 1980 and the Petition stated:

> "The Petitioner purchased the DC-9 airplane and took delivery in Wichita, Kansas. The airplane commenced immediate interstate air operation prior to its arrival in Nevada. The airplane has never been stored or used within the State of Nevada except when it is engaged in interstate air operations, pursuant to authority issued by the Civil Aeronautics Board."

Mr. Campbell requested that the words "Civil Aeronautics Board" be stricken from the Petition and that the "Federal Aviation Agency" be substituted therefor. The

Hearing Officer concurred.

Mr. Campbell submitted as exhibits the Articles of Incorporation of Great American Airways, Inc.; a copy of the operating certificate issued by the Federal Aviation Administration dated September 26, 1979 and a copy of the purchase agreement between the Petitioner and Trans World Airlines Inc. for the procurement of a Douglas DC-9-15 aircraft including installed engines.

FINDINGS OF FACT

1. Mr. Fune testified that the Petitioner was a Nevada corporation incorporated on June 28, 1979 and had been issued FAA "121 Commercial Operators Certificate" as a charter operator for the Carson City Nugget. Mr. Fune noted that they were not permitted to charge individual passengers but were limited to contracting with

casinos or entertainment groups in their air operations. The Petitioner has but one aircraft that was purchased from Trans World Airlines for $3.6 million dollars and that delivery took place in Wichita, Kansas, on August 17, 1979. The aircraft was flown to Kansas City, Kansas where a maintenance contract with Trans World Airlines was in effect and where certain work was done on the aircraft.

2. The contract with the Carson City Nugget was made prior to procurement of the aircraft and was essential for the financing of the purchase. The Federal Aviation Authority officials took part in a "proving" flight in mid September of 1979 where the aircraft was flown from Kansas City, Kansas, to Reno, Nevada, and from thence to Seattle for "touch and go" landings then returning to Reno where the

aircraft remained overnight. After an additional flight to Boise, Idaho on the following day the aircraft returned to Kansas City. After additional maintenance work in Kansas City the aircraft was flown to Reno, Nevada where additional crew members were hired and qualified. Commencing on the 26th of September, 1979 and daily through the 30th of September of 1979 the Petitioner assisted Evergreen International Airlines in conducting charter flights for the Carson City Nugget. The contract with the Carson City Nugget became effective October 1, 1979.

3. Subsequent to the commencement of the contract operations with the Carson City Nugget the Petitioner also entered into contracts with the University of Nevada Reno Athletic Department on November 19, 1979 and the MGM Grand Hotel in

Reno on November 25, 1979. These short term contracts are still in force. The contract with the Carson City Nugget is an eight (8) year contract and guarantees Petitioner 100 flying hours per month at a set rate but with 15% escalation clauses.

4. All flights are made to locations outside of the State of Nevada and, in most instances, the aircraft remains overnight at the out-of-state location.

5. The Petitioner contends that the aircraft has been in interstate commerce since the date of purchase in Wichita, Kansas on August 17, 1979.

6. All major maintenance of the aircraft is done in Kansas City, Kansas under a contract with TWA. Minor maintenance is accomplished in either Oakland, California or Los Angeles, California. Maintenance of the aircraft in Reno is limited to a

"daily walk-around" or an "A" or "B" check. Such routine maintenance consists of checking oil levels, tires, hydraulic pressure and routine services. Such maintenance is also done whenever the aircraft remains overnight at some other location.

7. Competitive airlines, not based in Nevada, are not required to pay Nevada sales or use taxes though operating under similar contracts.

8. The aircraft is registered in the State of Nevada according to official Federal Aviation Administration records and is, in fact, doing business in Nevada.

9. The aircraft is home based in Reno, Nevada and parts for the aircraft are shipped into Nevada and the use tax has been paid on such parts.

10. Tax is imposed on tangible personal property used by Nevada businesses

and citizens.

11. Use of the aircraft prior to September 26, 1979 was for testing and to insure that the aircraft and crew met FAA standards. The first commercial flight for which the Petitioner received compensation was on behalf of Evergreen International Airlines on September 26, 1979 after the aircraft was located in Reno, Nevada.

CONCLUSIONS OF LAW

1. NRS 372.075 defines storage as including any keeping or retention in this state for any purpose except sale in the regular course of business or subsequently for the purpose of transporting it outside the state for use thereafter solely outside the state of tangible personal property purchased from a retailer.

2. NRS 372.080 states in part "storage

and use do not include the keeping, retaining or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside of the state for use thereafter solely outside the state . . ." (emphasis added)

3. NRS 372.185 imposes an excise tax on the storage, use or other consumption in the state of tangible personal property purchased from any retailer.

4. NRS 372.265 states: "There are exempted from the taxes imposed by this chapter gross receipts from the sale of, and the storage, use or other consumption in this state of, tangible personal property the gross receipts from the sale of which, or the storage, use or other consumption of which, this state is prohibited from taxing under the constitutional

laws of the United States or under the constitution of this state."

5. Attorney General's Opinion No. 285 of May 17, 1962 holds: "Tangible personal property, for conduct of business operations by a Nevada airline company constituting interstate commerce, is not immune or exempt from state non-discriminatory storage and use excise tax, simply because purchase and transfer of legal title thereto was effected extra-state, if a taxable moment or event in connection therewith is shown to have occurred within the state before the same again is regularly placed in interstate commerce."

6. NRS 372.320 exempts from the taxes the gross receipts from occasional sales of tangible personal property and the storage, use or other consumption in this state of tangible personal property, the

transfer of which to the purchaser is an occasional sale.

7. NRS 372.055 defines a retailer as every person making more than two retail sales of tangible personal property during any 12 month period.

DECISION

WHEREAS Petitioner indicated that certain flight logs pertaining to the initial operation of the DC-9 aircraft in question and citations from the United States Supreme Court and other state supreme courts in similar instances could be provided to the Hearing Officer, it was determined that the Petitioner should be given until Tuesday, May 20, 1980 to submit such information. Petitioner did, in fact, submit the information indicated on May 22, 1980 having been granted an extension of time for submission by the

Hearing Officer.

WHEREAS, the Hearing officer having heard the testimony and reviewed the documents submitted by the Petitioner, the following decision is rendered:

(1) Contract air operations did not commence until after the aircraft was situated in Nevada and the tax due is non-discriminatory and the taxable incident does not fall within the exemption cited in NRS 372.320.

(2) The "occasional" sale exemption insofar as a purchaser is concerned applies only if the individual transferring the property to the purchaser does not meet the statutory definition of a retailer. No evidence having been presented that Trans World Airlines is not a retailer as defined in Nevada statute 372.055, the transaction is determined not

to be an "occasional" sale.

Accordingly, the Petition for Redetermination is denied and the findings of the audit are affirmed and the tax, together with applicable interest is now due and payable. The taxpayer is reminded that interest will continue to accrue until the tax liability is extinguished.

No part of this decision shall become final until the Tax Commission has an opportunity to affirm, modify or reverse this decision in its entirety or any part thereof.

The taxpayer has an opportunity pursuant to Rules 56 through 60 of the Regulations of Practice and Procedure before the Nevada Tax Commission to appeal all or any part of this decision to the Tax Commission by filing with the Tax Commission a notice of intent to appeal within fifteen

(15) days from the receipt of a copy of this decision.

Dated at Carson City this 22nd day of May, 1980.

FOR THE COMMISSION:

/s/ ROY E. NICKSON
Roy E. Nickson
Hearing Officer

APPENDIX E

NOTICE DENYING
ADMINISTRATIVE APPEAL

October 9, 1980
Certified Mail-828908

Richard G. Campbell, Esq.
P.O. Box 2610
Reno, NV 89505

Re: Appeal of Great American
Airways, Inc.
Account No. 204-751
Docket No. 11524

Dear Mr. Campbell:

At a regularly scheduled meeting of the Nevada Tax Commission in Carson City on October 7, 1980 the Commission denied the appeal of Great American Airways, Inc. and affirmed the Hearing Officer's decision dated May 22, 1980 in the Matter of the Petition for Redetermination of a Deficiency Determination of Great American Airways, Inc.

The motion was made by Commissioner

Mikulich, seconded by Commissioner Plath and carried unanimously.

FOR THE COMMISSION

/s/ ROY E. NICKSON
Roy E. Nickson
Executive Director

APPENDIX F

PERTINENT TEXT OF ADDITIONAL PROVISIONS OF NEVADA REVISED STATUTES CHAPTER 372

Nevada statutes define the incidents of use taxation as follows--

> "Use" includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of that property in the regular course of business.

NRS 372.100.

> "Storage" includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer.

NRS 372.075.

> "Storage" and "use" do not include the keeping, retaining or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state, or for the purpose of being processed, fabricated or manufactured into, attached to, or incorporated into, other tangible

> personal property to be transported outside the state and thereafter used solely outside the state.

NRS 372.080. Nevada statutes create the following presumptions in favor of taxation--

> It is presumed that tangible personal property shipped or brought to this state by the purchaser on or after July 1, 1979, was purchased from a retailer on or after July 1, 1979, for storage, use or other consumption in this state.

NRS 372.250.

> 1. On and after July 1, 1979, it is presumed that tangible personal property delivered outside this state to a purchaser known by the retailer to be a resident of this state was purchased from a retailer for storage, use or other consumption in this state and stored, used or otherwise consumed in this state.
>
> 2. This presumption may be controverted by:
>
> (a) A statement in writing, signed by the purchaser or his authorized representative, and retained by the vendor, that the property was purchased for use at a designated point or points outside this state.
>
> (b) Other evidence satisfactory to the department that the property was not purchased for storage, use or other consumption in this state.

NRS 372.255.

> There are exempted from the taxes imposed by th[ese statutes] the gross receipts from the sale of, and the storage, use or other consumption in this state of, tangible personal property the gross receipts from the sale of which, or the storage, use or other consumption of which, this state is prohibited from taxing under the Constitution or laws of the United States or under the constitution of this state.

NRS 372.265.

If approved by Nevada voters at the general election on November 4, 1986, the following paragraph will be added to NRS 372.185-

> The tax is imposed with respect to all property which was acquired out of state in a transaction that would have been a taxable sale if it had occurred within this state.